No. 456

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Supreme Court of the United States

OCTOBER TERM, 1950.

MERRITT-CHAPMAN & SCOTT CORPORATION,
Petitioner and Appellee below,

against

THE NEW YORK TRUST COMPANY, as Trustee,
and ROSE GREEN,
Respondents and Appellants below.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION.

JOHN J. MANNING,
Counsel for Petitioner.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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MERRITT-CHAPMAN & SCOTT CORPORATION,
Petitioner and Appellee below,

against

THE NEW YORK TRUST COMPANY, as Trustee,
and ROSE GREEN,
Respondents and Appellants below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, The Supreme Court of the United States:

The petition of Merritt-Chapman & Scott Corporation respectfully shows:

I.

Summary Statement of the Matter Involved.

Petitioner, a Delaware corporation, sued respondent, a New York corporation, in the United States District Court for the Southern District of New York, for a declaratory judgment; petitioner's complaint (R. 4-10) sought to have the court adjudge that holders of perpetual common stock warrants issued by petitioner were not entitled to have deposited in their behalf, with respondent as trustee, any part of a stock dividend duly declared to holders of record of September 15, 1950 and payable on October 16, 1950 "on each legally issued and outstanding share of said com-

mon stock in the hands of the public" (R. 75), unless said warrant holders had exercised their options to become common stockholders by September 15, 1950. Petitioner annexed to its complaint and made a part thereof (R. 11-60), a copy of an indenture entered into by it with the respondent as of December 1, 1928, which provided for the form of said warrants, the terms of their issuance, and rights of the warrant holders.

The answer of the respondent (R. 62-63) admitted the allegations of the complaint, but asked that the court adjudge that the perpetual common stock warrant holders were entitled to have a proportional amount of said stock dividend deposited with respondent for their benefit, and for delivery to them, if and when they should exercise their warrants and become stockholders and sought other relief incidental to the enforcement of its demands.

There being no disputed facts, petitioner moved for summary judgment (R. 64), which was granted without opinion, in a memorandum (R. 84). From the judgment entered thereon (R. 87-89), respondent appealed (R. 90).

The United States Court of Appeals for the Second Circuit in an opinion by Swan, Circuit Judge, with L. Hand, Chief Judge concurring and Clark, Circuit Judge dissenting (not yet reported), reversed and directed judgment in favor of respondent, and ordered that dividend shares be deposited with the trustee for the benefit of the warrant holders.

The warrants prompting the litigation were issued pursuant to the indenture, and permitted the holders to purchase an aggregate of 40,000 shares of the common stock of no par value of the corporation, subject to the terms of the indenture (R. 27). These warrants are irrevocable (R. 74), without termination date, and permit the holders to purchase shares of common stock at a maximum

price of $30.00 per share, subject to reduction and/or readjustment (R. 14, 15). The trustee under said indenture was made agent of the corporation to distribute the warrants, and upon exercise of rights thereunder to deliver the shares of stock covered thereby (R. 13, 30). At the time of the execution of the indenture in 1928, the corporation delivered in trust to the trustee stock certificates representing 40,000 full paid and non-assessable shares of the corporation's common stock of no par value (R. 29, 30).

The petitioner's Board of Directors duly declared a 40% stock dividend (R. 75) on July 12, 1950 and authorized and directed the treasurer of the corporation to transfer $20.00 for each dividend share from the earned surplus account to the common capital stock account of the corporation (R. 75-80).

The trustee, the respondent here, who is authorized to act for the warrant holders by the indenture (R. 51) demanded that the corporation deposit with it stock certificates in an amount equal to the amount of such stock dividend, if the same had been declared upon common stock represented by the stock certificates held in trust by it (R. 62, 63). The petitioner refused (R. 6).

The corporation gave 60 days written notice, by publication, of the stock dividend to the warrant holders, as provided by the indenture (R. 44-46) "to the end that, during such period of sixty days, the holders of warrants outstanding hereunder may purchase stock in accordance with such warrants and be entitled in respect of shares so purchased to all of the rights of the other holders of similar stock of the Corporation" (R. 44-46, 61); and such notice announced that the corporation would promptly submit to a court of competent jurisdiction the question of the right of warrant holders to participate in the stock dividend subsequent to the record date (R. 61).

II.

Reasons Relied on for the Allowance of the Writ.

1. This case involves an important and novel question of law. The question involves the right of a holder of a common stock purchase warrant to a stock dividend declared and payable on a date prior to his election to become a stockholder. The majority opinion herein of the U. S. Court of Appeals, Second Circuit entitles such warrant holder upon the exercise of his warrant at any later time to become entitled to a stock dividend declared by the Board of Directors of the corporation on July 12, 1950 and payable on October 15, 1950 to stockholders of record on September 15, 1950. No case has been cited by either party which has permitted a warrant holder to participate in such a stock dividend. This court, in the case of *Helvering* v. *Southwest Consolidated Corporation,* 315 U. S. 194 at pages 200 and 201, stated that the rights of a warrant holder were purely contractual and that a warrant holder was not a stockholder and could not assert the rights of a stockholder. It is submitted that the majority opinion below has permitted the warrant holder to enjoy the rights heretofore granted only to stockholders. It is respectfully urged that the majority opinion herein is not only without precedent but is contrary to the law as stated by this court in the above cited case.

2. The majority opinion below cites the decision of this court in *Eisner* v. *Macomber,* 252 U. S. 189 for the proposition that a stock dividend is merely a "watering" of the outstanding shares of stock and does not change the proportional interest of the stockholders in the corporation. It is respectfully submitted that the reliance upon this de-

cision involving solely the question of the right of Congress to tax as income a stock dividend to the stockholders, is misplaced and that its application to the present state of facts involves a misconception and misconstruction of the basic law of stock dividends which is of vital concern to corporations, stockholders and warrant holders generally.

In the instant case, the petitioner is subject to the laws and constitution of Delaware which require (Section 35, Delaware Corporation Law, and Article IX, Section 3, Delaware Constitution), that all shares of capital stock issued by the Corporation be supported by consideration. In the case of a stock dividend the consideration is the capitalization of surplus. In compliance with the Delaware Law above cited the Board of Directors of the petitioner adopted a resolution (R. 75-80) fixing a value of $20.00 per share for each dividend share and further transferring such an amount from the surplus account to the capital account.

Under the decision of the Circuit Court, the petitioner is required to deposit shares of stock with the respondent Trustee in an amount equivalent to dividend shares had the warrants been exercised. By virtue of the existing laws of the State of Delaware it may well be that in addition the petitioner will be required to take from its surplus account and segregate, a sum equivalent to $20.00 per share for each of the shares of stock which it has been directed to deposit under the ruling of the Circuit Court. This invasion of surplus will render unavailable to existing stockholders, a substantial sum which might otherwise be available for cash dividends.

It follows that the rationale of the *Macomber* case should be limited to the facts which it involved and should not be extended to a situation where it will result in serious prejudice to stockholders. It is clear that while as between the corporation and its existing stockholders, a stock dividend does not affect or change the proportionate interest of the

stockholder in the corporation as has been held by this Court in the *Macomber* decision, when the interests of third parties, to wit, warrant holders, are involved, there is a clear disadvantage to the existing stockholders in view of the transfer of assets above described.

3. The common stock purchase warrants involved in the instant case are perpetual, with no limitation in time upon their exercise. As pointed out in the dissenting opinion of Judge Clarke below, there is a clear conflict between the Second and Third Circuits of the U. S. Court of Appeals with respect to the valuation of perpetual warrants. (See *SEC* v. *Leventritt,* 179 F. 2d 615 (C. C. A. 2, 1950), Cert. granted S. Ct. October 9, 1950 and *In re Commonwealth and Southern Corporation,* 183 F. 2d 81 (C. C. A. 3, 1950).) The present problem is closely allied, inasmuch as the rights of warrant holders to participate in past accrued stock dividends is certainly one which affects their value and may well be present in other cases in the Federal Courts.

WHEREFORE, your petitioner prays that writ of certiorari issue under the seal of this court, directed to the U. S. Court of Appeals for the Second Circuit directing said court to certify and send to this court a full and complete transcript of the record and the proceedings of the said Circuit Court, had in the case numbered and entitled on its docket, Cal. No. 71, Merritt-Chapman & Scott Corporation, plaintiff-appellee *v.* The New York Trust Company as Trustee, defendant-appellant, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that judgment herein of said Circuit Court of Appeals be reversed by this court; and for such other and further relief as to this court may seem proper.

Dated, December 12, 1950.

JOHN J. MANNING,
Counsel for Petitioner

Supreme Court of the United States

OCTOBER TERM, 1950.

MERRITT-CHAPMAN & SCOTT CORPORATION,
Petitioner and Appellee below,

against

THE NEW YORK TRUST COMPANY, as Trustee,
and ROSE GREEN,
Respondents and Appellants below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

There was no opinion rendered by the United States District Court, Southern District of New York. The majority and dissenting opinions of the Circuit Court below (R. 95-104) rendered on November 8, 1950 is still unreported.

II.

Jurisdiction.

A. The mandate of the United States Circuit Court of Appeals for the Second Circuit has been stayed by stipulation entered into among the parties of record and so ordered by that court on November 15, 1950, pending determination by this court of petitioner's application for a writ of certiorari by this court.

B. The jurisdiction of this court is invoked pursuant to the provisions of Title 28, U. S. Code, Section 1254 (1) and Rule 38 of the Rules of the Supreme Court of the United States.

C. The reasons stated in the preceding petition under II (pp. 4-6) are herewith adopted and made a part of this brief, are believed to constitute good grounds for invoking the jurisdiction of this court.

III.

Statement of the Case.

A statement of the case has been set forth in the preceding petition under I (pp. 1-3) which is hereby adopted and made a part of this brief.

IV.

Summary of the Argument.

A. The decision of the U. S. Court of Appeals, Second Circuit, is unprecedented and is in conflict with the law stated by this court in *Helvering* v. *Southwest Consolidated Corporation,* 315 U. S. 194, 200, 201.

B. The decision of the U. S. Court of Appeals, Second Circuit, misapplies and misconstrues with respect to the effect of a stock dividend, the law as expressed by this court in the case of *Eisner* v. *Macomber,* 252 U. S. 189.

C. There is a clear conflict between the Second and Third Circuits of the U. S. Court of Appeals with respect to the valuation of perpetual warrants which involves a problem closely allied to the present controversy.

Argument.

A.

The decision of the U. S. Court of Appeals, Second Circuit, is unprecedented and is in conflict with the law stated by this court in Heivering *v.* Southwest Consolidated Corporation, *315 U. S. 194, 200, 201.*

The decision of the court as expressed in the majority opinion is without previous authority. The only cases which have been cited by counsel for either side which involve the same problem are *Sutliff* v. *Cleveland & Mahoning Railroad Co.*, 24 Ohio St. Rep. 147 (1873) and *Gay* v. *Burgess Mills*, 30 R. I. 231, 74 Atl. 714 (1919). In both, the warrant holders' claims for stock dividends declared and paid prior to their becoming stockholders were denied. The decision in the instant case is the only one reported in which a court has seen fit to permit a warrant holder to participate in a stock dividend earned, declared and payable on a date prior to his becoming a stockholder.

In the case of *Helvering* v. *Southwest Consolidated Corp.*, 315 U. S. 194 at pages 200, 201, this court defined the relationship between a warrant holder and a corporation as follows:

> "Whatever rights a warrant holder may have 'to require the obligor corporation to maintain the integrity of the shares' covered by the warrants (see *Berle, Studies in the Law of Corporation Finance* (1928), pp. 136-142) he is not a shareholder. *Gay* v. *Burgess Mills*, 30 R. I. 231, 74 A. 714; cf. *Miles* v. *Safe Deposit & T. Co.*, 259 U. S. 247, 252, 66 L. Ed. 923, 926, 42 S. Ct. 483. His rights are wholly contractual. As stated by Holmes, J., in *Parkinson* v. *West End Street R. Co.*, 173 Mass. 446, 448, 53 N. E. 891, 892, he 'does not become a stockholder by his

> contract in equity any more than at law.' At times his right may expire on the consolidation of the obligor corporation with another. *Ibid.* If at the time he exercises his right there are no authorized and unissued shares to satisfy his demand, he will get damages not specific performance. *Bratten* v. *Catawissa R. Co.*, 211 Pa. 21, 60 A. 319. And see *Van Allen* v. *Illinois C. R. Co.*, 7 Bosw. (N. Y.) 515. Thus he does not have, and may never acquire, any legal or equitable rights in shares of stock. *Lisman* v. *Milwaukee, L. S. & W. R. Co.* (C. C.) 161 F. 472, 480, affirmed in (C. C. A. 7th) 170 F. 1020. And he cannot assert the rights of a shareholder."

In two Law Review articles upon this subject it has also been stated that a warrant holder is not entitled to participate in a stock dividend declared by a corporation. See Berle, "Convertible Bonds and Stock Purchase Warrants," 36 Yale L. J. 649 at page 656; Hills "Convertible Securities, Legal Aspects of Draftsmanship", 19 Cal. Law Review 1 at page 10. Therefore, it is urged that since the decision below is without precedent, and in conflict with the above cited language of this court, it is necessary and proper that this court review the decision herein.

B.

The decision of the U. S. Court of Appeals, Second Circuit misapplies and misconstrues with respect to the effect of a stock dividend, the law as expressed by this court in the case of Eisner *v.* Macomber, *252 U. S. 189.*

The decision of the court below relies upon the language employed by this court in *Eisner* v. *Macomber*, 252 U. S. 189. There, in considering the effect of a stock dividend upon corporation and existing stockholder to determine the

liability of the stockholder for income taxes, this court stated at pages 202, 203:

> "The stock dividend really takes nothing from the property of the corporation, and adds nothing to the interest of the share holders. Its property is not diminished and their interests are not increased • • • The proportional interest of each share holder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones."

It is respectfully urged that this language although accurately representing the effect of a stock dividend as between corporation and existing stockholders, has no application and was not intended to apply to a situation where the rights of warrant holders become involved. The instant decision requires the corporation to deposit dividend shares to be paid in the future to warrant holders, as and if they become stockholders.

Section 35 of the Delaware Corporation Law, and Article IX, Section 3, Delaware Constitution require capitalization of surplus, as a prerequisite to the payment of a stock dividend, and in the case of shares without par value, at such price as may be fixed by the Board of Directors. The petitioner herein (a Delaware Corporation) pursuant to Delaware Law by its Board of Directors, fixed a value of $20.00 per share as the measure of capitalization required (R. 75-80). The decision of the court below may require the extension of this capitalization to the dividend shares required to be reserved for warrant holders. Hence, the damaging effect upon the existing stockholders which was completely ignored by the decision below.

As stated by Professor Ballantine in his textbook on *Corporations* (Rev. Ed. 1946) at pages 482-3:

> "The principal limitation upon the issue of ordinary share dividends is a peculiar one, the capitalizing of surplus, the transfer on the books of a certain amount of the accumulated income or other variety of surplus to capital account. This is more than a mere bookkeeping entry. It decreases surplus and increases the legal capital margin which limits dividend distributions. When a share dividend is charged against earned surplus, it has been said that this in effect is the same as a distribution of accumulated profits to the shareholders and a compulsory subscription for shares or reinvestment by them of the amount received in the corporation. By the transaction the former surplus is *pro tanto* rendered unavailable for dividend distributions, which is good for creditors, but a disadvantage to the shareholders."

The dissenting opinion of Judge Clarke states (R. 103), "* * * this is one of those cases sufficiently disputable so that the approach one initially makes to the problem actually points the way to the final solution." It is submitted that the basic approach of the prevailing view below, that the stock dividend simply effected a "watering" of the stock, with no effect upon the proportional interest of the stockholder and the corporation, is based upon a misapplication of *Eisner* v. *Macomber,* and should be reviewed by this court.

This is further appropriate in view of the fact that the question involves a basic problem of corporate law with broad implications of interest to corporations, stockholders and warrant holders generally.

C.

There is a clear conflict between the Second and Third Circuits of the U. S. Court of Appeals with respect to the valuation of perpetual warrants which involves a problem closely allied to the present controversy.

As pointed out in the dissenting opinion of Judge Clarke, there is a conflict of opinion between the Second and Third Circuits with respect to the valuation of perpetual stock warrants in cases of corporate reorganization. See *SEC* v. *Leventritt,* 179 F. 2d 615 (C. C. A. 2, 1950), certiorari granted S. Ct. October 9, 1950 and in re *Commonwealth and Southern Corporation,* 184 F. 2d 81 (C. C. A. 3, 1950). The present problem is closely allied inasmuch as the right of a warrant holder to participate in past accrued stock dividends is certainly pertinent upon the question of their valuation. As a result of the decision below, a warrant holder is entitled to stock dividends declared or to be declared by the corporation until the end of time. As a result a warrant holder who faces none of the vicissitudes of the corporate existence, is assured of a perpetual right not only to purchase stock but with it also all the increments which that stock may attain by way of stock dividend until the corporation terminates its existence. Certainly such a privilege is highly unusual and would increase the value of the warrant far beyond the normal expectations. Moreover, there is no authority to support such a position.

Conclusion.

It is respectfully submitted that the questions raised in this case are of sufficient gravity and importance to require this court to issue a writ of certiorari to the U. S. Court of Appeals, for the Second Circuit, to review its decision made herein.

JOHN J. MANNING,
Counsel for Petitioner.

Appendix A.

Section 35 of the Delaware Corporation Law Annotated, 1949:

DIVIDENDS; HOW DECLARED AND PAID; VIOLATIONS OF SECTION; PENALTY; EXONERATION FROM LIABILITY:—No corporation created under the provisions of this Chapter, nor the Directors thereof, shall pay dividends upon any shares of the corporation except in accordance with the provisions of this Chapter. Dividends may be paid in cash, in property, or in shares of the capital stock, in the case of shares with par value at par, and in the case of shares without par value at such prices as may be fixed by the Board of Directors. In case of any willful or negligent violation of the provisions of this Section, the Directors under whose administration the same may happen shall be jointly and severally liable, at any time within six years after paying such unlawful dividend, to the corporation and to its creditors, in the event of its dissolution or insolvency, to the full amount of the dividend so unlawfully paid, with interest on the same from the time such liability accrued; provided that any Director who may have been absent when the same was done, or who may have dissented from the act or resolution by which the same was done, may exonerate himself from such liability by causing his dissent to be entered at large on the books containing the minutes of the proceedings of the Directors at the time the same was done, or forthwith after he shall have notice of the same, or by causing a true copy of such dissent to be published, within two weeks after the same shall have been so entered, in a newspaper published in the County where the corporation has its principal office.

Delaware Constitution (Article IX, Section 3).

No corporation shall issue stock, except for money paid, labor done or personal property, or real estate or leases thereof actually acquired by such corporation.

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MERRITT-CHAPMAN & SCOTT CORPORATION,
Petitioner and Appellee below,

against

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Respondents and Appellants below.

BRIEF OF RESPONDENT, THE NEW YORK TRUST COMPANY, AS TRUSTEE, IN OPPOSITION TO PETITION OF MERRITT-CHAPMAN & SCOTT CORPORATION FOR WRIT OF CERTIORARI.

JOSEPH M. HARTFIELD,
JESSE E. WAID,
Counsel for The New York Trust Company, as Trustee, Respondent.

Dated January 11, 1951.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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BRIEF OF RESPONDENT, THE NEW YORK TRUST COMPANY, AS TRUSTEE, IN OPPOSITION TO PETITION OF MERRITT-CHAPMAN & SCOTT CORPORATION FOR WRIT OF CERTIORARI.

Statement of Facts and Legal Issue.

Incidental to a sale of its preferred stock, the Merritt-Chapman & Scott Corporation ("Petitioner") issued common stock Purchase Warrants in bearer form (R. 14). These bearer Warrants are outstanding in the hands of the public. The Warrants were issued under an Indenture dated December 1, 1928 (the "Indenture") between the Corporation and The New York Trust Company, as Trustee ("Respondent"). Under the terms of the Warrants and the Indenture, the holders are entitled in perpetuity to purchase common stock of the Corporation, upon the terms set forth in the Warrants and the Indenture.

To insure that stock covered by the Warrants would be available when the holders exercised their rights, certificates of stock were delivered to Respondent, registered in the name of Petitioner and endorsed by it in blank.

On July 12, 1950, the Board of Directors of Petitioner declared a stock dividend, payable on October 16, 1950, to stockholders of record on September 15, 1950 (R. 75).

Petitioner instituted a declaratory judgment suit (R. 4) to have it determined that a Warrant Holder was entitled to the stock dividend only in the event that he exercised the Warrant prior to the record date of September 15, 1950 (R. 10). Petitioner based its claim largely upon the provisions of Section 10 of the Indenture (Complaint, p. 9). Respondent contended that Warrant Holders were entitled to the stock dividend upon the exercise of Warrants, even if the Warrants were exercised subsequent to the record date. This contention was based largely on Section 7 of Article III (R. 37) of the Indenture.

Without opinion, the District Court granted summary judgment. The Court of Appeals reversed the decision of the District Court and held that, under the provisions of the Indenture, a Warrant Holder was entitled to receive the stock dividend equivalent, payable upon the shares held in trust by the Trustee, upon the exercise of his right to subscribe, without limitation of time.

Section 7 of Article III of the Indenture (over which, unlike certain other sections, other provisions are not expressly made paramount if contrary thereto) provides in part:

> "As long as the warrants shall remain valid and outstanding, the Corporation will not pay any dividends on its common stock * * * 'unless the Corporation shall deposit in trust with the Trustee stock certificates * * * equal to the amount of such stock dividend, if the same had been declared upon the common stock represented by the stock certificates then held in trust by the Trustee hereunder, and the Trustee shall, * * * upon the exercise of Warrants, deliver * * * with any shares of common stock pur-

chased thereunder, but without additional consideration therefor, such number of shares as may be equal to such stock dividend, if the same had been declared upon the common stock so purchased, * * *.''

Unlike certain other provisions of the Indenture, Section 10 of Article III (part of which is quoted on page 3 of Petitioner's petition) does not contain any statement that it controls and overrides any contrary provisions of the Indenture.

The only question presented to and considered by the Court of Appeals was the correct interpretation of the Indenture.

POINT I.

There is no question of sufficient gravity or of general importance to warrant the issuance of a writ of certiorari.

The only question involved is the correct interpretation of the Indenture.

The following cases reflect the applicable legal principles:

Hamilton Shoe Co. v. *Wolf Brothers,* 240 U. S. 251, 258 (1915);

Forsyth v. *Hammond,* 166 U. S. 506, 514 (1896);

Hallanan v. *Eureka Pipe Line Co.,* 261 U. S. 387, 393 (1922);

San Giorgio I v. *Rheinstrom Co.,* 294 U. S. 494, 495 (1934);

Heisler v. *Thomas Colliery Co.,* 260 U. S. 235 (1922).

Respondent contends that this case involves only the narrow question of whether solely as the result of the provisions of the Indenture, Warrant Holders who exercise

their Warrants subsequent to the record date are entitled to a stock dividend. Petitioner admits that the rights of Warrant Holders are purely contractual (p. 4 of Petitioner's brief), thereby in effect conceding that the problem is solely one of construction of the Indenture.

Assuming that other indentures exist which contain identical or similar provisions, in the event that a controversy similar to the case at bar arose before a Federal court, the court would, under the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U. S. 202 (1937), be governed by any applicable state cases which might have been decided rather than by the decision of this Court, because construction of an indenture between private corporations is a matter of local law.

In view of the foregoing, it is respectfully submitted that this case presents no question of public importance sufficient to warrant the issuance of a writ of certiorari.

POINT II.

This case presents no conflict of decisions between Courts of Appeal of different Circuits.

There is no reported decision of any court with respect to the interpretation of indenture provisions identical with, or similar to, the provisions of the Indenture.

Petitioner calls attention to the following two cases as allegedly being in conflict and closely allied with the present controversy: *In re Commonwealth and Southern Corporation,* 184 F. 2d 81 (3d Cir. 1950); *S.E.C.* v. *Leventritt,* 179 F. 2d 615 (2d Cir. 1950).

In Re Commonwealth and Southern Corporation, supra, involved an appeal by a warrant holder from an order of the District Court approving a plan of liquidation filed by

the Commonwealth and Southern Corporation with the Securities and Exchange Commission pursuant to Section 11(c) of the Public Utility Holding Company Act of 1935. The plan made no provision for the warrant holders. The Court affirmed the judgment and approved the Commission's analysis to the effect that since there was no probability of earnings sufficient to raise the price of the stock to the level of the warrant-exercise price, the warrants were valueless and the warrant holders were not entitled to participation in the plan. The Court further stated that evidence of market value was only "remotely connected, if at all" with the foregoing analysis.

S. E. C. v. *Leventritt, supra,* concerned a plan of reorganization under the Public Utility Holding Company Act of 1935 which made no provision for warrant holders. The Court remanded the plan to the Securities and Exchange Commission on the ground that petitioner's stock warrants, entitling him to a call upon the common stock of the Niagara Hudson Power Corporation at $50, were not worthless since the warrants had a present market value, and there was no indication that Congress intended that value to be disregarded.

Even if these cases present a conflict (actual or apparent), they nonetheless have no possible relevance to the issue at hand, since they involve no question pertaining to the rights of the Warrant Holders and Petitioner *inter sese* under the Warrants and the Indenture. Thus, should this Court decide to review the Court of Appeals' decision, the conflict alleged by Petitioner would not be reconciled.

In addition, the cases of *In Re Commonwealth and Southern Corporation* and *S. E. C.* v. *Leventritt* involved the application of Federal statutes and are thus controlled by Federal law; while the case at bar is governed exclusively

by local law, since the issue concerns solely the construction of the Indenture.

Furthermore, it follows that a writ of certiorari need not lie even if there were inconsistent decisions between the circuits on the precise question at issue, for the Courts of Appeal would simply be applying the local law of their respective circuits. To this effect, see *Ruhlin* v. *N. Y. Life Ins. Co.*, 304 U. S. 202 (1938).

POINT III.

The decision of the Circuit Court is not in conflict with any decision of this Court.

Petitioner asserts that the court below erroneously relied on the rationale of *Eisner* v. *Macomber*, 252 U. S. 189 (1920). In that case, this Court held that the receipt of a stock dividend by a stockholder was not taxable as income, since the stock dividend did not alter the stockholder's pre-existing proportionate interest in the corporation, nor did it constitute a distribution or realization of profits; that it was merely a "watering" of outstanding shares.

The Court below simply stated that the purpose of Section 7 of Article III of the Indenture was to provide against the "watering" of the shares represented by the Warrants. Thus the basis of the Court's decision was not that the application of the rationale of *Eisner* v. *Macomber, supra,* entitled Warrant Holders who exercised their warrants subsequent to the record date to stock dividends; but rather that the Indenture so entitled them.

Conclusion.

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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